Anwar et al v. Fairfield Greenwich Limited et al Doc. 176

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

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|---|---|
| ANWAR, et al. v. FAIRFIELD GREENWICH LIMITED, et al. | Master File No. 09 CV 0118 (VM)<br>09 CV 5012 (VM) (Morning Mist Action)<br>09 CV 2366 (VM) (Ferber Action)<br>09 CV 2588 (VM) (Pierce Action) |

**SUPPLEMENTAL DECLARATION OF KENT A. BRONSON IN SUPPORT OF *MORNING MIST* PLAINTIFFS' MOTION TO VACATE CONSOLIDATION ORDER AND TO APPOINT MOVANTS' COUNSEL AS CO-LEAD DERIVATIVE COUNSEL**

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***Attorneys for Plaintiffs***

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I, Kent A. Bronson, under penalty of perjury, hereby declare:

1. I am a member of the firm of Milberg LLP, One Pennsylvania Plaza, New York, New York 10119, counsel for plaintiffs in the *Morning Mist*, *Ferber* and *Pierce* derivative actions (09 CV 5012, 09 CV 2366, and 09 CV 2588). I submit this supplemental declaration in support of the *Morning Mist* plaintiffs' motion (i) to vacate the Court's Order dated June 9, 2009 (Dkt. 167, 09 CV 0118, and Dkt. 11, 09 CV 5012), which consolidated for pretrial purposes *Morning Mist* with the *Anwar* action, 09 CV 0118 (VM); and (ii) to appoint movants' counsel, Milberg LLP and Seeger Weiss LLP, as Co-Lead Derivative Counsel.

2. On July 24, 2009, movants filed *Morning Mist* Plaintiffs' Memorandum of Law in Support of their Motion to Vacate Consolidation Order and to Appoint Movants' Counsel as Co-Lead Derivative Counsel ("Memorandum"). The Memorandum references the following undocketed letters to the Court, true copies of which are submitted herewith for the convenience of the Court and the parties:

Exhibit 1: Letter of Robert C. Finkel, Esq., dated April 24, 2009

Exhibit 2: Letter of Mark G. Cunha, Esq., dated June 5, 2009

Exhibit 3: Letter of Mark G. Cunha, Esq., dated June 9, 2009

Dated: June 24, 2009

/s/ Kent A. Bronson
Kent. A. Bronson

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April 24, 2009

**BY FACSIMILE**

The Honorable Victor Marrero
United States District Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

**Re: Anwar, et al., v. Fairfield Greenwich Limited, et al., 09-CV-00118 (VM)**

Dear Judge Marrero:

We are interim co-lead counsel for plaintiffs in the above *Anwar* action. We are writing in connection with the filing today of the Consolidated Amended Complaint, and also with respect to the pending motion for remand in the *Ferber* and *Pierce* actions referenced below.

By Orders dated March 24, 2009 and March 31, 2009, the Court consolidated with the *Anwar* action two cases that were filed as derivative actions: *Ferber v. Fairfield Greenwich Group*, 09 CV 2366 (VM); and *Pierce v. Fairfield Greenwich Group*, 09 CV 2588 (VM). As the Court is aware, the cases that were initially consolidated into the *Anwar* action were all class actions asserting direct claims on behalf of the shareholders in two "feeder funds" that channeled investments into Bernard Madoff's Ponzi fraud – Fairfield Sentry Limited (a British Virgin Islands (BVI) investment fund, which supposedly had $7.3 billion in assets) and Greenwich Sentry, L.P. (a Delaware limited partnership, which supposedly had $200 million in assets).

It is our understanding that when the Court ordered the consolidation of the *Ferber* and *Pierce* actions into the *Anwar* action, Interim Co-Lead Counsel were responsible for considering whether to assert not only direct claims on behalf of the Funds' investors, but also any related derivative claims on behalf of the Funds. The Consolidated Amended Complaint that we are filing today continues to assert only direct claims. Although we do not believe there would be any conflict in asserting both direct and derivative claims under the circumstances in this action,[1] we are not asserting derivative claims at this time pending further developments (discussed below) with respect to liquidation of the Funds, while reserving the right to assert derivative claims later if circumstances warrant.

Specifically, certain of our clients have commenced proceedings in the BVI for the appointment of a liquidator for Fairfield Sentry. The liquidator, if appointed, could consider whether to assert claims on behalf of Fairfield Sentry that would otherwise be asserted in the Consolidated Amended Complaint as derivative claims on behalf of the Fund. Under BVI law, a judicial determination must be made prior to filing a derivative action that the case satisfies certain statutory requirements, including a showing that "the company does not intend to bring . . . the proceedings" as a direct claim. *See* §184C(3)(a) of the BVI Business Companies Act. Inasmuch as the *Anwar* plaintiffs anticipate that a liquidator will be appointed, and may well assert direct claims on behalf of Fairfield Sentry, we are not asserting those Fairfield Sentry derivative claims at this time.

Similarly, we believe it likely that proceedings in the Delaware courts may lead to appointment of a liquidator for Greenwich Sentry, who would be in a position to pursue direct claims on behalf of that Fund. If that occurs, assertion of derivative claims in this action may be superfluous.

On the other hand, because the liquidation proceedings are just beginning, it is possible that the BVI or Delaware courts may not make the anticipated appointments, or that the liquidators may not assert direct claims on behalf of the Funds. In that event, it may be necessary for the *Anwar* plaintiffs to seek permission to amend the Consolidated Amended Complaint to assert derivative claims.

With respect to the motion to remand filed by the Milberg firm in the *Ferber* and *Pierce* cases, we take no position on whether removal was proper. We believe, however, that if the *Ferber* case remains in this Court, its consolidation with the *Anwar* proceedings is proper. We disagree with counsel's argument, at page 9 of the Memorandum of Law in Support of Its Motion to Remand (Docket No. 89), that any conflict or other barrier to assertion of derivative claims in a class action which also raises direct claims of shareholders exists in the circumstances presented here. *See* note 1 above. In any event, the Court need not decide that issue in ruling on the remand motion, or (if remand is denied) in finding that the interests of judicial economy and consistency justify maintaining consolidation of all Madoff/Fairfield-related suits in the *Anwar* action.

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[1] *See, e.g.*, *Kane Assoc. v. Clifford*, 80 F.R.D. 402, 407-08 (E.D.N.Y. 1978) ("To deny the possibility of such community of interest on the basis of mechanical rules excluding any derivative plaintiff from ever[ ] representing a class suing the corporation might well, as a practical matter, deny both the class and the corporation the right to vindicate wrongs done against them in situations such as that alleged in the verified complaint to exist here.").

Respectfully submitted,

Robert C. Finkel

RCF:rd
cc: Magistrate Judge Theodore H. Katz (by facsimile)
Counsel for all Parties (see accompanying facsimile sheet)

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June 5, 2009

Re: *Morning Mist Holdings Ltd. et al. v. Fairfield Greenwich Group et al.*, Docket No. 09 CV 5012 (VM); *Anwar et al. v. Fairfield Greenwich Limited, et al.*, Docket No. 09 CV 0118 (VM)

Hon. Victor Marrero
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Dear Judge Marrero:

We represent defendant Fairfield Greenwich Advisors LLC ("FGA") and other defendants in *Morning Mist Holdings Ltd. et al. v. Fairfield Greenwich Group et al.*, Docket No. 09 CV 5012 ("*Morning Mist*"). We write in response to Mr. Wallner's letter to the Court of earlier today opposing our request for consolidation of *Morning Mist* into *Anwar et al. v. Fairfield Greenwich Limited, et al.*, Docket No. 09 CV 0118 ("*Anwar*").

Plaintiffs in *Morning Mist* oppose consolidation on the ground that *Morning Mist* is a derivative action and *Anwar* is a class action. But in so doing, Plaintiffs ignore the fact that this Court has already consolidated into *Anwar* two other substantially similar derivative actions – *Pierce et al.* v. *Fairfield Greenwich Group, et al.*, Docket No. 09 CV 2588 ("*Pierce*"), and *David I. Ferber SEP IRA* v. *Fairfield Greenwich Group, et al.*, Docket No. 09 CV 2366 ("*Ferber*"). Plaintiffs in *Morning Mist* – who are represented by the same counsel as plaintiffs in *Pierce* and *Ferber* – fail to provide any valid reason why the consolidation directed by the Court in *Pierce* and *Ferber* should not also be directed by the Court in *Morning Mist*.

Contrary to Plaintiffs' suggestion, this Court has ample authority to consolidate derivative and class actions. *See e.g., Glauser v. EVCI Career Colleges Holding Corp.*, 236 F.R.D. 184, 186 (S.D.N.Y. 2006) ("The derivative suit, which also arises out of Defendants' alleged false and misleading statements about EVCI's earnings and enrollment, is consolidated with the class actions for discovery purposes. The Court will consider at a later date whether it will be consolidated for trial as well."); *Baughman v. Pall Corp.*, 250 F.R.D.

121, 129-30 (E.D.N.Y. 2008) (consolidating shareholder derivative action with class actions for purposes of discovery); *In re IAC/InterActiveCorp Secs. Litig.*, 478 F. Supp. 2d 574, 577 (S.D.N.Y. 2007) (consolidating shareholder derivative actions with class action suit for pretrial purposes).

Plaintiffs' other basis for opposing consolidation – that they have sued defendants not named in *Anwar*, including PricewaterhouseCoopers LLP – is unavailing. First, consolidation does not require complete overlap in parties, and Plaintiffs point to no authority so suggesting. *See In re Fuwei Films Sec. Litig.*, 247 F.R.D. 432, 435 (S.D.N.Y. Jan, 24, 2008) (holding that the existence of additional defendants does not preclude consolidation); *Pinkowitz v. Elan Corp., PLC*, 2002 U.S. Dist. LEXIS 14593 (S.D.N.Y. July 29, 2002) ("[C]onsolidation is not barred simply because the actions to be consolidated allege claims against different parties.").

Furthermore, the Court has already consolidated into *Anwar* four other actions asserting claims against PricewaterhouseCoopers ("PwC"): *Pierce, Ferber, Knight Services Holdings Limited v. Fairfield Sentry Limited, et al.*, 09 CV 2169, and *Zohar v. Fairfield Greenwich Group*, 09 CV 4031. Counsel for PricewaterhouseCoopers LLP has already appeared in and is actively litigating the *Anwar* action. *See* Docket Nos. 147-153 (Kirkland & Ellis LLP appearing on behalf of PwC); *See* Letter from Robert A. Wallner to Timothy Duffy, dated May 22, 2009 (demanding that PwC make its initial disclosures); Letter from Timothy Duffy to Robert A. Wallner, dated May 28, 2009 (rejecting plaintiffs' demand on the ground that PwC's initial disclosures were not yet due).

Finally, nothing in the Court's Consolidation Order in *Anwar* contemplates postponing briefing and/or a decision on consolidation until after a motion to remand is decided.

For the foregoing reasons, we believe it is clear that consolidation of *Morning Mist* into *Anwar* is appropriate at this time.

Respectfully submitted,

Mark G. Cunha

cc: United States Magistrate Judge Theodore H. Katz (by hand)
Plaintiffs' Counsel (by email)
Defense Counsel (by email)

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BY HAND

June 9, 2009

Re: *Anwar et al. v. Fairfield Greenwich Limited, et al.*, Docket No. 09 CV 0118 (VM)

Hon. Victor Marrero
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Dear Judge Marrero:

We represent defendant Fairfield Greenwich Advisors LLC ("FGA") and other defendants in *Anwar et al. v. Fairfield Greenwich Limited, et al.*, Docket No. 09 CV 0118 ("*Anwar*"). We write in response to the letter to the Court of earlier today from Robert Wallner, counsel for plaintiffs in *David I. Ferber SEP IRA* v. *Fairfield Greenwich Group, et al.*, Docket No. 09 CV 2366 ("*Ferber*"), *Pierce et al.* v. *Fairfield Greenwich Group, et al.*, Docket No. 09 CV 2588 ("*Pierce*"), and *Morning Mist Holdings Ltd. et al. v. Fairfield Greenwich Group et al.*, Docket No. 09 CV 5012 ("*Morning Mist*"), which the Court consolidated into *Anwar* on March 24, 2009, March 31, 2009, and June 9, 2009,[1] respectively (collectively, the "Consolidated Derivative Cases").

On June 8, 2009, the Court-appointed Interim Co-Lead Counsel and counsel for defendants in *Anwar* submitted to the Court a stipulation pursuant to which defendants consented to the service and filing by plaintiffs of a Second Consolidated Amended Complaint and agreed that defendants' time to answer, move against or otherwise respond to any complaint in *Anwar* would be adjourned until 45 days after service by plaintiffs of a Second Consolidated Amended Complaint (the "Stipulation"). For the Court's convenience, a copy of the Stipulation is attached hereto.

Mr. Wallner opposes the Stipulation to the extent it applies to "any complaint" in *Anwar*, including the complaints filed in the Consolidated Derivative Cases. Mr. Wallner's position is contrary to the clear terms of the Court's January 30, 2009 Consolidation Order

[1] Mr. Wallner's letter was submitted prior to the Court's order consolidating *Morning Mist*.

and Order for Appointment of Interim Co-Lead Counsel (the "Consolidation Order") and the Court's March 11, 2009 Civil Case Management Plan and Scheduling Order in (the "CMO").

*First*, Mr. Wallner's objection ignores the unambiguous terms of the *Anwar* CMO, which provides that "Defendants shall respond only to the Consolidated Amended Complaint; no response by Defendants is due to any individual complaints that are consolidated into the Consolidated Action." CMO ¶ 6. No response to the complaints in the Consolidated Derivative Cases is required, and Mr. Wallner's opposition to the Stipulation to the extent it applies to those complaints is misguided.

*Second*, Mr. Wallner's assertion that the Stipulation is objectionable because the Consolidated Amended Complaint in *Anwar* does not assert derivative claims is unfounded. Pursuant to the Consolidation Order, the Court designated "Lovell Stewart Halebian LLP, Wolf Popper LLP and Boies, Schiller & Flexner LLP as Interim Co-Lead Counsel to act on behalf of *all Plaintiffs* in the consolidated cases. . ." Consolidation Order at 5, ¶ 12 (emphasis added); *see also* Consolidation Order at 5, ¶¶ 14-15. Interim Co-Lead Counsel has clear authority to act on behalf of plaintiffs in the Consolidated Derivative Cases and determine what claims to pursue on behalf of all plaintiffs in *Anwar*. Indeed, the Court designated Interim Co-Lead Counsel in order to organize plaintiffs' counsel and avoid precisely the type of divisiveness and confusion reflected in Mr. Wallner's letter. Moreover, while the Consolidated Amended Complaint does not assert derivative claims, Interim Co-Lead Counsel has advised us that they are considering asserting such claims in the Second Consolidated Amended Complaint.

For the foregoing reasons, we believe that Mr. Wallner's opposition to the Stipulation is without merit and we respectfully maintain our request that the Court so-order the Stipulation.

Respectfully submitted,

Mark G. Cunha

cc: United States Magistrate Judge Theodore H. Katz (by hand)
All Counsel in *Anwar* (by email)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| Anwar *et al.*,<br><br>Plaintiffs,<br><br>vs.<br><br>Fairfield Greenwich Limited, *et al.*,<br><br>Defendants.<br><br>This Document Relates To: All Actions | MASTER FILE<br>Civil Action No.: 09-CV-0118 (VM) |

**STIPULATION ADJOURNING DEADLINE TO RESPOND TO THE COMPLAINT**

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned counsel for parties in the above-captioned action, as follows:

1. Defendants consent to the service and filing by Plaintiffs of a Second Consolidated Amended Complaint.

2. Defendants' time to answer, move against or otherwise respond to any complaint in this action is adjourned until 45 days after service by Plaintiffs of a Second Consolidated Amended Complaint.

3. By agreeing to this stipulation, Defendants and Plaintiffs do not waive and expressly preserve any and all defenses and claims they may have.

Dated: June 8, 2009
New York, New York

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IT IS SO ORDERED.

Dated: ______________

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The Honorable Victor Marrero
U.S.D.J.

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